In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 258

ALBERT STRITE AND COMMONWEALTH TRUST COMPANY OF PITTSBURGH, EXECUTORS OF THE ESTATE OF LILLIAN D. CREE, DECEASED, PETITIONERS

v.

EDWARD A. MCGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

At the date of her death, Lillian D. Cree was the income beneficiary and trustee[1] of two trusts established by her sisters. As trustee, she was empowered to distribute principal to herself whenever she determined it "necessary or advisable in order to provide for the reasonable needs and proper expenses or the benefit or comfort" of herself. Both courts below held that the corpus of the trusts was includible in the decedent's gross estate under § 2041 of the Internal Revenue Code of 1954 as property over which she had a general power of appointment.

[1] A corporate fiduciary was co-trustee of one of the trusts.

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The decedent's power was admittedly a "general" one (being exercisable in favor of herself, § 2041(b)(1)) unless it came within the express statutory exception for powers of invasion "limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent" (§ 2041(b)(1)(A)). The decision below that a power to appoint property for one's "benefit" or "comfort" is not limited by an ascertainable standard is correct, is required by the regulations,[2] and is supported by the uniform course of decisions.[3]

Petitioners' contention that the statute does not apply to powers held as a trustee is equally unsupportable. The statute defines a general power of appointment simply as a power to appoint property to one's self, and the capacity or manner in which it is exercisable—so long as it is not limited by an ascertainable standard—is irrelevant. See *Hurd* v. *Commissioner*, 160 F. 2d 610, 613 (C.A. 1st); *Welch* v. *Terhune*, 126 F. 2d 695, 697 (C.A. 1st),

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[2] Treas. Regs. on Estate Tax (1954 Code), § 20.2041-1(c)(2): "A power to use property for the comfort, welfare, or happiness of the holder of the power is not limited by the requisite standard."

[3] See *Merchants Bank* v. *Commissioner*, 320 U. S. 256, 261; *Henslee* v. *Union Planters Bank*, 335 U.S. 595, 598; *Helvering* v. *Evans*, 126 F. 2d 270, 272 (C.A. 3d), certiorari denied, 317 U.S. 638; *Newton Trust Co.* v. *Commissioner*, 160 F. 2d 175, 177 (C.A. 1st); *Price* v. *Rothensies*, 67 F. Supp. 591, 593 (E.D. Pa.) That such a provision imposes little effective limitation on the power of invasion is confirmed by State court decisions. See *Saurmann's Estate*, 39 Pa. D. & C. 629, 631; *Zumbro* v. *Zumbro*, 69 Pa. Super. Ct. 600, 603; *Rumsey's Estate*, 287 Pa. 448, 452; *Winthrop Co.* v. *Clinton*, 196 Pa. 472, 477.

certiorari denied, 317 U.S. 644; Rev. Rul. 55–518, 1955–2 Cum. Bull. 384.

There is in any event no conflict of decisions or other reason for review by this Court. The petition for certiorari should be denied.

Respectfully submitted.

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